Plywood Los Angeles, Inc. *and* **Luis Garcia.** Case 21-CA-18846

July 31, 1981

DECISION AND ORDER

On March 11, 1981, Administrative Law Judge Michael D. Stevenson issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings,[1] findings,[2] and conclusions[3] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge: This case was heard before me at Los Angeles, California, on November 10 and December 1 and 2, 1980,[1] pursuant to a complaint issued by the National Labor Relations Board's Regional Director for Region 21 on May 8, and which is based on a charge filed by Luis Garcia (herein called the Charging Party) on March 24. The complaint alleges that Plywood Los Angeles, Inc. (herein called Respondent), has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (herein called the Act).

Issues

Whether Respondent through its agent, Jose Gonzales:

1. Laid off or discharged the Charging Party because he engaged in union or other protected activities.

2. Laid off or discharged Pablo Garcia, brother of the Charging Party, as part of a pretext or coverup of the real reason for the layoff or discharge of the Charging Party.

3. Made various statements and threats to the Charging Party which reasonably tended to restrain and coerce him in exercise of the rights guaranteed him by Section 7 of the Act.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is a California corporation engaged in the wholesale distribution of plywood and other lumber products and having a facility located in Los Angeles, California. It further admits that during the past year, in the course and conduct of its business, it has purchased and received goods and products valued in excess of $50,000 from suppliers outside the State of California. Accordingly it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] All dates herein refer to 1980 unless otherwise indicated.

[1] In fn. 8 of his Decision, the Administrative Law Judge denied Respondent's request that the General Counsel be ordered to pay certain expenses, which Respondent claimed it was forced to incur needlessly because the General Counsel willfully and maliciously withheld a document relevant and necessary to Respondent's case. While we agree with the Administrative Law Judge that Respondent's request should be denied, we do not adopt his characterization of the General Counsel's conduct as unfair in any respect.

[2] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In adopting the Administrative Law Judge's credibility resolutions, we do not rely upon his statement in par. 3 of sec. III,B,2, that "Garcia and his brother both initially worked under different names at Respondent's company to avoid certain tax or Social Security consequences," since the Garcia brothers' status as undocumented workers or illegal aliens is irrelevant to determining their credibility as witnesses. We also do not rely upon the Administrative Law Judge's comments in the same paragraph regarding the lack of any evidence to corroborate Luis Garcia's testimony about his one-on-one conversations with Supervisor Gonzales in March 1980, such as evidence that Luis Garcia immediately told other employees or the Union about the alleged statements made to him by Gonzales indicating animus toward his attempts to become a member of the Union. Nevertheless, we adopt the Administrative Law Judge's crediting of Gonzales' testimony over that of Luis Garcia, inasmuch as the Administrative Law Judge relied upon other independent factors in resolving this credibility issue.

In par. 4 of sec. III,B,1, of his Decision, the Administrative Law Judge incorrectly stated that "Respondent knew that the two Garcia brothers were due in on Saturday to pick up their last paychecks . . . . " In fact, the record reveals that the two Garcia brothers had received their last paychecks earlier that week, on the day they were laid off, and that their visit to Respondent's premises on Saturday was unannounced and unexpected. This error in the Administrative Law Judge's findings does not affect his conclusions, and we do not rely upon it in adopting his Decision.

[3] In adopting the Administrative Law Judge's recommendation that the complaint in this case be dismissed we find it unnecessary to pass on his discussion of Respondent's economic defense, inasmuch as we agree that the evidence presented by the General Counsel does not make out a *prima facie* case that Luis Garcia's union and protected concerted activities were motivating factors in Respondent's decision to terminate Luis and Pablo Garcia. Moreover, we do not rely upon the discussion in fn. 7 of the Administrative Law Judge's Decision, since it is not based on any evidence in the record but rather is merely speculative.

II. THE LABOR ORGANIZATION INVOLVED

Respondent neither admits nor denies, but I find, that Lumber & Sawmill Workers Union, Local No. 2288, and the Los Angeles County District Council of Carpenters of the United Brotherhood of Carpenters & Joiners of America, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Respondent is a wholesale distributor of plywood and other building materials, and employs about 50 employees. Of these, about six or seven are truckdrivers represented by Teamsters Local 420, not involved in this case. Another five or six employees are warehousemen represented by the Union. Both Unions have had contracts with Respondent for approximately 23 years. Apart from the matters alleged in the complaint, there is no evidence of labor problems. In addition to the classifications described above, Respondent employed in early 1980 about three nonunion mechanics and several "white collar" employees such as salesmen, a sales manager, and a clerical staff. The alleged discriminatee, Luis Garcia, and his brother, Pablo Garcia, were two of four maintenance employees who were not members of either bargaining unit described above. On or about March 24, these four employees were laid off by Respondent. Immediately after the layoffs, Armando Moran and Gillardo Cisneros, the other two maintenance employees, began working at Banks Manufacturing Company. This company has about 65 nonunion employees and is located about two blocks from Respondent's present place of business. The president of this company, Abraham Banks, testified at hearing that his company is a component manufacturer of furniture parts. It buys all of its supplies from Respondent and sells all of its finished products to Respondent. Respondent's maintenance employees were laid off on a Monday; when the two Garcia brothers returned on the following Saturday to pick up a vacation check, they observed Moran and Cisneros working at Respondent, on one occasion stacking materials and about an hour later sweeping up. Neither of the Garcia brothers spoke to the other two men nor did the men speak to the Garcias.

Luis Garcia began working at Respondent in October 1976; his brother, Pablo, in November 1976. About 6 or 7 months later, the Charging Party approached Union Official Jack Carpenter to see how he could become a member of the Union. Garcia made this same inquiry about two or three more times over the next 2 years. Carpenter, a witness at hearing, testified that, after each contact by Garcia and on one or two other occasions on his own, he discussed with Respondent's president, George Kersey, also a witness, whether cleanup and maintenance employees could be covered under the contract. Each time, Kersey resisted expanding the unit on the grounds that he could not afford an increase in dental insurance and retirement. In January, Carpenter was replaced as union business agent by William Butcher. Like Carpenter, he visited Respondent's premises about two times a month. Shortly after he replaced Carpenter, Butcher contacted the Charging Party to ask him what he did. When Garcia said he did everything, Butcher asked him if he were in the Union, and Garcia said, "No." Subsequently, Butcher took up the matter with Kersey and upon being informed that Garcia was one of four cleanup workers, not included in the unit, Butcher did not pursue the matter further.

The Garcias, Moran, and Cisneros were told of their layoffs on March 24 by Jose Gonzales, warehouse supervisor. Himself a member of the Teamsters local, Gonzales said, "You are all laid off; no more work!" He then handed the four men their paychecks. According to the Charging Party, Gonzales said to him privately before he left the building, "These are the results of your interviews with the Union."

Gonzales has worked for Respondent for 12 years; for the last 5 years, he has been a supervisor. He is in charge of the truckdrivers, warehousemen, mechanics, and, prior to the layoff, the four general maintenance employees. He hired Luis Carcia in 1976. Both Gonzales and Kersey testified that the decision to lay off the maintenance employees was made by Kersey in compliance with the directive of the board of directors to reduce overhead costs. In following this mandate, Kersey testified that several "white collar" and clerical employees were allowed to resign by arrangement when in fact they were laid off. Subsequent to the layoff of Luis Garcia and the others, two of the three mechanics were laid off. All of these subsequent decisions were also made by Kersey.

B. *Analysis and Conclusions*

The General Counsel alleges that Luis Garcia, age 23, was threatened with discharge and actually discharged, because of his protected concerted activities; i.e., his efforts to join the Union. At the close of hearing, the General Counsel was permitted to amend the complaint to allege further that, on the day of discharge or layoff, Jose Gonzales told Luis Garcia that his termination was the result of his protected concerted activities. As to Pablo Garcia, the General Counsel admits that Pablo engaged in no protected concerted activities himself, but that his discharge or layoff was part of the pretext or coverup regarding his brother, Luis. If these charges are proven, both brothers would be entitled to an appropriate remedy. Turning to the record, I divide my discussion of the evidence into three parts.

1. The Banks Manufacturing Company

Initially, the General Counsel disavows any claim that Banks is an *alter ego* or joint employer with Respondent. (Resp. br., p. 321.) Rather, I'm told there is some vague tie-in or connection between Respondent and Banks. (Resp. br., p. 71.) The record does not support this theory. More specifically, I find that the appearance of Moran and Cisneros at Respondent's premises on the Saturday after the Monday layoff is not proof that the Charging Party was discharged for unlawful reasons.

First, neither Moran nor Cisneros testified at the hearing so we are unable to learn firsthand how they happened to be hired by Banks. Both were apparently still

working for Banks on the day of the hearing and could easily have been subpenaed, much as witness Banks was. Moreover, Moran is and has been married to Garcia's sister for the past several years. The Charging Party has known Moran for approximately 15 years. After they were laid off by Respondent on March 24, Moran and Cisneros were hired by Luis Gamboa, a supervisor at Banks. Like the two men he hired, Gamboa was not called as a witness. However, there is evidence to explain the hiring in a manner consistent with a normal business practice.

In the case of Moran, his brother, Salvador Campos, had been working at Banks for about 5 or 6 months, as of March 24. It is possible this helped Moran secure employment. In the case of Cisneros, he had been working at Banks since September 1978, even while employed by Respondent. Thus, between the two jobs he was able to work constantly since, when it was slow at one company, he would work at the other. These facts tend to explain the apparent ease with which the two men started their jobs at Banks after March 24.

Similarly, the record shows nothing curious about Moran and Cisneros working on Respondent's premises on the following Saturday after the layoff. It was a common business practice for Respondent and Banks to permit the use of each other's employees for certain types of unskilled maintenance work. The Charging Party testified that frequently he would be assigned to Banks to perform various jobs. Moreover, since Respondent knew that the two Garcia brothers were due in on Saturday to pick up their last paychecks, the failure of Respondent to attempt to cover up the hiring of Moran and Cisneros indicates to me that Respondent considered the use of these two employees then employed by Banks as nothing more than a normal business practice. The failure of Luis Garcia or his brother to make inquiry of the two employees, one their own brother-in-law and longtime acquaintance, further convinces me that the Garcia brothers as well considered the activity routine.

To be sure, there is some suggestion that Respondent and Banks did not deal with each other at the normal arm's length. In addition to the routine interchange of employees referred to above, Respondent permitted certain premises it leased to be used by Banks because Banks was unable to obtain the lease on its own business credit. Kersey testified that he did not know whether Banks was paying Respondent for the use of this space. At a time when Respondent claimed to be forced to cut costs by layoffs of the Garcias, failure of Kersey to know whether Banks was paying for use of a portion of the warehouse surely is a suspicious circumstance. Yet, on balance, the evidence regarding Banks is more consistent with Respondent's innocence. Further, when this evidence is considered in light of the General Counsel's disavowal of *alter ego* or joint-employer relationship between the two business entities, I believe Kersey's testimony that he never consulted with anyone at Banks before Moran and Cisneros were hired.

2. Statements of Jose Gonzales

The basic issue here is assessment of credibility between the Charging Party and Jose Gonzales. Garcia testified that Jose Gonzales made certain remarks to him after Garcia began to ask the union business agent about joining the Union. In 1977, well outside the limitation period, Gonzales is alleged to have told Garcia, "Stop talking to the business agent or he [Gonzales] would take his job."[2] Another incident occurred about 2 weeks before the layoff when Garcia allegedly requested Rogelio Reynozo to obtain a copy of the union contract for Garcia so the latter could examine it. Reynozo, an employee of Respondent's and a foreman before Gonzales took the job, was never called as a witness. Allegedly, Garcia also told Reynozo, "Don't say this to your 'compadre.'" According to Garcia, he meant, "Don't tell Gonzales." Although the record does not reflect how Reynozo interpreted this statement, Garcia testified that a few days later Gonzales spoke to him privately and said, "What is this about the Union? What do you want the contract for? You will never be a member of the Union and it will all be useless." A final statement was allegedly made by Gonzales to Garcia on March 24, shortly after the four men were told they were being terminated. According to Garcia, Gonzales told him privately, "These are the results of your interview with the Union."

Gonzales testified that Garcia did talk to him about changing work assignments or about getting into the Union. Thereafter, the testimony of Gonzales conflicts sharply with that of Garcia. According to the former, Garcia approached him on three occasions, once in late 1977 or early 1978, and again in late February or early March, relative to becoming a forklift operator. On these occasions, Gonzales explained to him that his English was not good enough to read invoices and maps in order to load trucks properly. On a third occasion, which was not fixed chronologically, Garcia asked Gonzales about being a union member, in order to drive a forklift and receive a greater salary and more benefits, particularly medical benefits. Again, Gonzales advised him to learn English and then he would be considered. As to the conversation involving Reynozo, Gonzales admitted that Reynozo had talked to him. However, Gonzales testified that he understood Reynozo to say that Garcia had been looking through Gonzales' desk for a copy of the union contract. Thereafter, Gonzales said to Garcia, "What the hell he was looking through my office, looking for a contract?" Garcia said very little in response. Finally, as to the statement allegedly made to Garcia on March 24, Gonzales denied making it.

In resolving the credibility issue, I credit the testimony of Gonzales and discredit the testimony of the Charging Party. I find the testimony of the former to be more believable and consistent with the facts and circumstances of the case. The testimony of Garcia in relevant part is not supported by any other witness or by the facts and circumstances of the case. Moreover, if Gonzales had

[2] On cross-examination, Garcia testified that Gonzales asked him, "What the f— do you want with the Union?"

made the statements attributed to him by Garcia, I believe the latter would have made a prompt complaint to some other person—such as a union official, his brother, or Moran, his brother-in-law.[3] So, not only did no one else ever hear Gonzales' alleged statements, but there is no evidence that Garcia told anyone in this case about them, when it would have been likely for him to do so. Despite his lack of command of the English language, the Charging Party was by no means a meek and passive individual. Witness his conversations with the two union officials, with Kersey, and at the union office to obtain a copy of the union contract.[4] In addition, Garcia and his brother both initially worked under different names at Respondent's Company to avoid certain tax or social security consequences. Accordingly, I find the testimony of Luis Garcia to be completely uncorroborated. The lack of corroborating evidence is further demonstrated by the General Counsel's failure to call Moran, Cisneros, and Reynozo as witnesses.[5] It would have been particularly appropriate to call Reynozo on rebuttal to deny that he ever told Gonzales that Luis Garcia had been looking for a union contract in Gonzales' office. Instead, Garcia was called in rebuttal and denied that he had been looking for a union contract in the office of Gonzales, when this was not the issue in rebuttal. Thus, Gonzales' testimony on this point stands uncontradicted. Finally, since Luis Garcia was the moving force in filing a charge, or in his words, "to sue the company" after his discharge, he would have immediately told the others of Gonzales' alleged remark made just a short while before, so as to persuade them to join in filing charges. His apparent failure to do so is impeaching.

Other factors also influence my judgment of Luis Garcia's credibility. Despite evidence of above average intelligence—his command of English had improved significantly between his discharge and the day of the hearing—Luis Garcia demonstrated a degree of selective recall at the hearing which, when considered in the context of this case, lessened his credibility at the hearing. For example, although present for the testimony of his brother on the day before he testified, Luis Garcia claimed that he heard it, but did not remember it. He did not know his date of birth without looking at his driver's license. He did not know the name of one of his past employers. When Garcia could not recall events of this type and yet claimed to recall exact statements made by Gonzales, I doubt his credibility.

Generally, I found Gonzales to be more credible in his testimony, particularly since, in light of the Company's apparent amicable relationship with the two Unions, there was no apparent reason for Gonzales to be hostile toward Garcia merely because the latter wished to join the Union.

3. Respondent's economic defense

Although I have resolved the critical credibility question adverse to the General Counsel, I nevertheless analyze this case in terms of *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), because I again arrive at the same conclusion reflected above. That is, I cannot find that the General Counsel has proven his case. Thus, the attempts by Luis Garcia to join the Union, either by promotion to forklift driver or by expansion of the unit to include general maintenance employees, are clearly protected concerted activity. However, I cannot find, on the evidence presented, a *prima facie* case of employer reliance on Garcia's protected activity as a motivating factor in his discharge. Nor does the evidence show that Pablo Garcia was discharged as part of a pretext or coverup involving his brother. However, assuming *arguendo* that a *prima facie* case had been presented, I find that the Employer has met its (purely hypothetical) burden to show that the decision to terminate the Garcia brothers would have been the same even in the absence of protected activity.

Thus, I have referred above to Respondent's lack of union animus. I also note the uncontradicted testimony that Respondent's profits had been declining in early 1980, when the board of directors ordered Kersey to reduce expenses as he saw fit. The General Counsel acknowledges (G.C. br., pp. 5–6) the evidence relating to unfilled positions, other layoffs both before and after those involving the Garcia brothers and the evidence that the maintenance employee positions were never filled. Instead, the warehouse employees performed the cleanup tasks formerly done by the maintenance employees. The General Counsel asserts that Respondent did not save $2,000 to $3,000 per week as claimed; they only saved about $600 per week! It is unnecessary to decide who is right.[6] Rather, I hold that savings of $600 per week when a small company is attempting to reduce costs are significant. Even if this amount is further reduced by the additional cost of overtime in order for the warehousemen to do the additional work, the savings are still significant.[7]

[3] I have examined the affidavit of Luis Garcia (G.C. Exh. 8b) given to a Board agent on March 28, and find it generally to be consistent with his testimony. Yet, this affidavit is not sufficient, in light of other evidence and lack thereof, to convince me that Garcia is a credible witness.

[4] Witness also this exchange on cross-examination:

> Q. Did anyone ever tell you that your English was not good enough to be a forklift driver?
>
> A. [Luis Garcia] I don't remember, but as far as I can tell, forklifts don't speak English. . . .

[5] I do not suggest that the General Counsel's failure to call these witnesses raises an adverse inference. Since the witnesses were equally available to both sides, an adverse inference is not appropriate. *Hitchner Manufacturing Company*, 243 NLRB 927 (1979). On the other hand, these potential, but unrealized sources of corroborating evidence cannot be ignored.

[6] Of course, the General Counsel's computation is based on certain assumptions: That all maintenance employees were making about the same pay, that no variable costs such as workmen's compensation insurance premiums were affected, and that the productivity of the warehouse employees remained the same. In passing, I note that Kersey was never asked to explain his estimate of $2,000 to $3,000 per week savings by the layoffs.

[7] The collective-bargaining agreement between Respondent and the Union was effective from April 1, 1977, to March 31. (G.C. Exh. 2.) While the scope of the unit is not a mandatory subject of bargaining, *Newport News Shipbuilding and Dry Dock Company*, 236 NLRB 1637 (1978), enfd. 602 F.2d 73 (4th Cir. 1979), the Union could have at least attempted to bargain with Respondent about Garcia's request, or the Union could have, presumably, attempted through the Board to clarify the bargaining unit so as to include Garcia. See *WNYS-TV (WIXT)*, 239 NLRB 170 (1978). The Union did neither. This lack of action by the Union to expand its own empire tends to corroborate Respondent's de-

Continued

Finally, the General Counsel contends that because, for the several weeks before they were laid off, the Garcia brothers worked some overtime, this impeaches the economic defense of Respondent. Not so. Respondent never claimed it lacked work for the employees. It argued only that it was forced to cut costs by terminating the employees. Perhaps some of the work which the maintenance people were supposed to do never was done after their discharge. Also, the Charging Party testified that Respondent frequently, sometimes on a daily basis, sent its employees to Banks to do work. (Resp. br., pp. 257-259.) Thus, this is work which Banks could and apparently did take over and perform with its own employees.

In sum, I find that Gonzales did not make the unlawful statements alleged in the complaint, that the General Counsel has not proven a *prima facie* case that Luis Garcia was terminated because of his union or other protected concerted activities, and finally, even if Garcia were terminated for an unlawful reason, Respondent has met its burden of proof to show that Garcia would have been terminated anyway. Accordingly, I will recommend dismissal of the complaint in its entirety.[8]

fense, since the Union must have accepted Kersey's claim that Respondent could not afford the increased expense of this proposed change.

[8] Respondent claims that the General Counsel willfully and maliciously withheld from Respondent a document relevant, material, and necessary to Respondent's defense. Respondent further claims that, as a consequence of the General Counsel's failure to disclose the document, it was forced to incur certain expenses needlessly in obtaining a copy of the document. Accordingly, Respondent asks that the Charging Party be ordered to pay said expenses. I am convinced that, if the General Counsel acted unfairly, it was inadvertent. It also appears that Respondent may have misunderstood the General Counsel's theory of the case. In any event, I reject Respondent's request as unfounded in logic, or law. Cf. *Teckwal Corp.*, 253 NLRB 187 (1980); *Standard Homes, Inc.*, 249 NLRB 1085, fn. 2 (1980).

CONCLUSIONS OF LAW

1. Respondent, Plywood Los Angeles, Inc., is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Unions are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in the unfair labor practices alleged in the complaint.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[9]

It is hereby ordered that the complaint be, and it hereby is, dismissed in its entirety.

[9] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.